Supreme Court of the United States

OCTOBER TERM, 1973

No. 1020

JOSEPH DAVIS,

Petitioner,

against

AMERICAN EXPORT ISBRANDSTEN LINES, INC., and S. S. EXPORT COMMERCE, her engine, tackle, cargo, gear and apparel.

Respondents,

and

TODD SHIPYARDS CORP.,

Third Party Defendants.

BRIEF OF TODD SHIPYARDS CORP., THIRD PARTY DEFENDANT BELOW, IN OPPOSITION TO PLAINTIFF'S PETITION FOR A WRIT OF CERTIORARI

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Todd Shipyards Corp., Third Party Defendant below, submits this memorandum in opposition to Plaintiff's Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered on the 24th day of October, 1973, which judgment affirmed the judgment of the United States District Court for the Eastern District of New York.

Opinions Below

Petitioner's Appendix to his petition sets forth the text of the opinion of the United States District Court for the Eastern District of New York, together with the text of the affirmance without opinion by the United States Court of Appeals for the Second Circuit.

Jurisdiction

The jurisdictional requisites are set forth in the Petition on page 2.

Questions Restated

1.) Where a plaintiff has failed to carry his burden of proof on factual issues to establish a prima facie case of negligence or unseaworthiness against a defendant shipowner, should this Court grant certiorari?

2.) Where there has been no attempt to acquire and no perfection of, *in rem* jurisdiction, is any *in rem* theory of liability before a Court?

Reasons for Denying the Writ

Based upon the evidence introduced at the trial, the decision below in no way conflicts with holdings of other circuits or imposes a limitation over the protection provided by the Sieracki doctrine. There being no *in rem* jurisdiction reference in the Petition to *in rem* remedies, are out of place.

Statement

The opinion of the U. S. District Court contains several specific references to failures by plaintiff to introduce evidence sufficiently probative of negligence or unseaworthiness on the part of the shipowner to require the shipowner to produce counter evidence.

POINT I

That the Plaintiff has failed to carry his burden of proof on factual evidence sufficient to establish a prima facie case against the Defendant shipowner is pointed out in the decision of the District Court and affirmed by the Court of Appeals.

The opinion of the District Court which is set forth in the Petitioner's Appendix, after explaining the circumstances, of Plaintiff's injury and the evidence reflected in the record, points up that the Plaintiff had failed to introduce any testimony to illuminate the physics of the problem (A-7). It further points out that the Plaintiff had not shown that the practice adopted by the shipyard was in any way negligent or inadequate or that it created a condition of transitory unseaworthiness (A-9). That there was no evidence supporting Petitioner's proposition that it was "seaman's work" to remove the 47,000 pound propeller is also noted in the decision of the District Court (A-10). Finally, the District Court clearly stated: "Something may have been done at the time of the accident which is lost to recollection. It is certainly not in evidence" (A-12).

In the circumstances expressed by the District Court and fully approved by the Second Circuit theories of legal liability of shipowners whether historic or recently determined by judicial decision are in no way affected by the decision of the District Court herein.

POINT II

There having been no perfection of *in rem* jurisdiction, principles of *in rem* liability are not involved.

The docket entries and the record below contradict Petitioner's statements set forth in its petition to the effect that *in rem* jurisdiction had been perfected against the vessel. There is no indication of process having been issued against the vessel, no posting of substitute security, no arrest of the vessel reflected in the docket or other records of this case. This fact is confirmed in the Respondent-Defendant, American Export Isbrandtsen Lines, Inc. brief in opposition to the Petition on pages 2, 3 and pages 16 and 17.

Conclusion

WHEREFORE, it is respectfully prayed that the Petition for certiorari sought by the plaintiff petitioner be denied.

Respectfully submitted,

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Todd Shipyards Corp.